

FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v Aulakh [2018] FCAFC 91

Appeal from: *Aulakh & Ors v Minister for Immigration & Anor* [2017] FCCA 544

File number: VID 376 of 2017

Judges: **TRACEY, MORTIMER AND MOSHINSKY JJ**

Date of judgment: 19 June 2018

Catchwords: **MIGRATION** – appeal from the Federal Circuit Court of Australia – skilled visa – where visa applicant nominated occupation of hairdresser – where visa applicant lodged assessment from Trades Recognition Australia that had been based on work reference letter from hairdressing salon in India – where Migration Review Tribunal concluded that the visa applicant failed to meet the requirements of Public Interest Criterion 4020 – where Tribunal found that the visa applicant was not employed as a hairdresser at the salon during the period claimed – where hearing before primary judge proceeded on the basis that the Tribunal had found that the visa applicant had not been employed at the salon at all – where the Minister sought to contend on appeal that the Tribunal had found that the visa applicant had not been employed as a hairdresser at the salon – whether leave should be granted to raise this contention on appeal – whether the primary judge erred in concluding that the Tribunal’s decision was affected by jurisdictional error – appeal allowed

Legislation: *Administrative Appeals Tribunal Act 1975* (Cth), s 44
Federal Court of Australia Act 1976 (Cth), s 37M
Freedom of Information Act 1982 (Cth)
Migration Act 1958 (Cth), ss 65, 97, 348, 357A, 359A

359AA, 430

Migration Regulations 1994 (Cth), Clause 886.225 of Sch 2, PIC 4020 of Pt 1, Sch 4

Migration Amendment Regulations 2011 (No. 1) (Cth), reg 5

Cases cited:

AAM15 v Minister for Immigration and Border Protection [2015] FCA 804; 231 FCR 452

ALZ15 v Minister for Immigration and Border Protection [2017] FCA 279

Coulton v Holcombe (1986) 162 CLR 1

CPE15 v Minister for Immigration and Border Protection [2017] FCA 591

Gill v Minister for Immigration and Border Protection [2017] FCAFC 51; 250 FCR 309

Haritos v Commissioner of Taxation [2015] FCAFC 92; 233 FCR 315

Honourable Brendan O'Connor v Adamas [2013] FCAFC 14; 210 FCR 364

Kelly v Australian Postal Corporation [2015] FCA 1064; 67 AAR 359

Lovell v Lovell [1950] HCA 52; 81 CLR 513

Minister for Immigration and Border Protection v MZAIIV [2016] FCA 251

Minister for Immigration and Border Protection v SZVFW [2017] FCAFC 33; 248 FCR 1

Minister for Immigration and Citizenship v Li [2013] HCA 18; 249 CLR 332

Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; 240 CLR 611

Nigam v Minister for Immigration and Border Protection [2017] FCAFC 127

O'Brien v Komesaroff (1982) 150 CLR 310

Rashid v Minister for Immigration & Citizenship [2007]

FCAFC 25

Summers v Repatriation Commission [2015] FCAFC 36;
230 FCR 179

SZUGL v Minister for Immigration and Border Protection
[2015] FCA 868

SZTIS v Minister for Immigration and Border Protection
[2017] FCA 545

Water Board v Moustakas (1988) 180 CLR 491

Date of hearing: 22 February 2018

Registry: Victoria

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 168

Counsel for the Appellant: Mr PRD Gray QC with Mr L Brown

Solicitor for the Appellant: Sparke Helmore Lawyers

Counsel for the First, Second, Third and Fourth
Respondents: Mr A Byrne

Solicitor for the First, Second, Third and Fourth
Respondents: Nandan Vaityte

Counsel for the Fifth
Respondent:

The Fifth Respondent did not appear

ORDERS

VID 376 of 2017

**BETWEEN: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION**

Appellant

AND: MANINDER KAUR AULAKH

First Respondent

GURWYN SINGH JAURA

Second Respondent

DIYA JAURA (and others named in the Schedule)

Third Respondent

JUDGES: TRACEY, MORTIMER AND MOSHINSKY JJ

DATE OF ORDER: 19 JUNE 2018

THE COURT ORDERS THAT:

1. 1. The appellant have leave to amend his notice of appeal to the form of the proposed notice of appeal set out in annexure “AC-8” to the affidavit of Adam Cunynghame affirmed 31 August 2017.
2. 2. The notice of appeal be treated as amended accordingly.

3. 3. The appeal be allowed.
4. 4. The orders of the primary judge be set aside and in lieu thereof it be ordered that the application be dismissed.
5. 5. Within seven days from the date of these orders, the parties file and serve written submissions (of no more than three pages in length) on the issue of costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

TRACEY AND MOSHINSKY JJ:

1 We have had the considerable benefit of reading in draft the reasons of Mortimer J. We agree with her Honour that grounds 2 and 3 of the notice of appeal should be upheld, for the reasons given by her Honour. In relation to ground 1, we agree with her Honour that this ground should be upheld, but would reach this conclusion by a different path. In summary, we would grant the appellant (the **Minister**) leave to amend his notice of appeal to insert paragraph 1(b), and would uphold ground 1 on the basis of paragraph (b) of that ground.

Background facts

2 In light of the detailed description of facts contained in her Honour's judgment, it is unnecessary to set out the facts in detail in these reasons. However, we set out the following brief summary of the background facts in order to provide context for the reasons that follow.

3 On 29 June 2010, the first respondent (**Ms Aulakh**) applied for a Skilled (Residence) (Class VB) (subclass 886) visa. The second, third and fourth respondents were (or became) secondary applicants for such a visa. In the application, Ms Aulakh nominated the occupation of hairdresser. Ms Aulakh lodged a skills assessment from Trades Recognition Australia (**TRA**) dated 10 June 2010 (the **TRA skills assessment**) for the nominated occupation. This was a replacement for an earlier skills assessment dated 15 August 2006.

4 In support of her application to TRA for a skills assessment, Ms Aulakh had provided a work reference letter from New Style Beauty Parlour & Coaching Centre (**New Style**), a hairdressing salon located in India, dated 24 June 2006 (the **work reference letter**). The work reference letter, which appeared to be signed by the owner of the salon, stated in part:

It is certified that Miss Maninder Kaur D/o. S. Gudarshan Singh is working with us as a hairdresser. She joined us after completing her diploma Beautician/Hair dresser from USHA Beauty Clinic in June 1998. She joined my Parlour i.e. New Style Beauty Parlour as a full time employee in 1st July 1998 and working till date. She is performing very well.

(Errors in original.)

5 On 23 January 2014, a delegate of the Minister refused the application for the visas. Ms Aulakh and the second, third and fourth respondents applied to the Migration Review

Tribunal (the **Tribunal**), now the Administrative Appeals Tribunal, for review of the delegate's decision.

On 30 June 2014, the Tribunal affirmed the delegate's decision. The Tribunal concluded that Ms Aulakh failed to meet the requirements of Public Interest Criterion 4020 (**PIC 4020**), which was a criterion for the visa. PIC 4020(1) relevantly required that "[t]here is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, ... [or] a relevant assessing authority ..., a bogus document or information that is false or misleading in a material particular" in relation to the application for the visa. The expression "bogus document" was defined as meaning "a document that the Minister reasonably suspects is a document that ... was obtained because of a false or misleading statement, whether or not made knowingly".

At [48] of its decision record, the Tribunal stated:

Having considered all the evidence, individually and cumulatively, and the submissions made by the applicants' migration agent, the Tribunal is not satisfied that the first named applicant was employed as a hairdresser at New Style Beauty Parlour and Coaching Centre. The Tribunal finds that the first named applicant was not employed as a hairdresser at New Style Beauty Parlour and Coaching Centre from 1 July 1998 to September 2007. Therefore, the Tribunal finds that the work reference from New Style Beauty Parlour and Coaching Centre dated 24 June 2006 was false as the first named applicant was not employed as a hairdresser at New Style Beauty Parlour and Coaching Centre from 1 July 1998 to 24 June 2006.

On this basis, the Tribunal found that the work reference letter was false at the time it was given. The Tribunal then concluded that Ms Aulakh had given, or caused to be given, to TRA, a relevant assessing authority, information that was false or misleading in a material particular. The Tribunal also concluded, on the same basis, that the TRA skills assessment was a bogus document. The Tribunal then concluded that Ms Aulakh had given or caused to be given, to the Minister or an officer of the Department, a bogus document in relation to the application for the visas.

The proceeding in the Federal Circuit Court

Ms Aulakh and the second, third and fourth respondents applied to the Federal Circuit Court of Australia for judicial review of the Tribunal's decision. Ms Aulakh's submissions proceeded on the basis that the Tribunal had made a finding to the effect that Ms Aulakh had not been employed at New Style, in the sense that she had not been employed there *at all*. (As discussed below, an alternative interpretation of the Tribunal's reasons is that it found

that Ms Aulakh had not been employed *as a hairdresser* at New Style.) In his submissions before the primary judge, the Minister did not dispute Ms Aulakh's interpretation of the Tribunal's reasons. It does not appear that attention was given to the alternative interpretation in the parties' submissions before the primary judge. The primary judge, understandably in the circumstances, proceeded on the basis that the Tribunal had made a finding to the effect that Ms Aulakh had not been employed at New Style at all: see the primary judge's reasons at [37], [38] and [40] (cf [34]). The primary judge concluded that this finding was legally unreasonable in the sense discussed in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332: see the primary judge's reasons at [35]-[41].

The appeal and the application for leave to amend

10 10 The Minister appeals from the orders of the Federal Circuit Court. The notice of appeal sets out three grounds, which correspond to the three bases upon which the primary judge upheld the application below. The Minister must succeed on all three grounds in order to succeed in the appeal.

11 11 The Minister seeks leave to amend his notice of appeal to insert a new paragraph 1(b). Paragraph 1 of the notice of appeal, including proposed paragraph (b), is as follows:

1. The Federal Circuit Court erred in concluding that the [Tribunal] committed jurisdictional error by unreasonably concluding that [Ms Aulakh] was not employed as a hairdresser at New Style Beauty Parlour and Coaching Centre because:
 - a. in concluding that the [Tribunal] had made an unreasonable factual finding the Federal Circuit Court ignored important aspects of the [Tribunal's] reasoning, in particular, the weight that it gave to:
 - i. its conclusion that [Ms Aulakh] and a witness, Ms Reeta Bajaj, gave inconsistent evidence about the circumstances in which a reference was produced;
 - ii. its conclusion that customer references were not authentic; and
 - iii. the fact that [Ms Aulakh] did not list her employment at New Style in her visa application.
 - b. in concluding that the [Tribunal] had made an unreasonable factual finding the Federal Circuit Court erred in its construction of the [Tribunal's] reasons:
 - i. the Federal Circuit Court held that the [Tribunal] found that [Ms Aulakh] had not ever worked at New Style Beauty Parlour and Coaching Centre;

ii. when the [Tribunal's] reasons are properly construed the [Tribunal] found that [Ms Aulakh] had not worked at New Style Beauty Parlour and Coaching Centre as a hairdresser.

12 12 It can be seen that, by proposed paragraph 1(b), the Minister seeks to contend that the primary judge erred in his interpretation of the Tribunal's reasons and that, on the proper construction of the Tribunal's reasons, the Tribunal found that Ms Aulakh was not employed *as a hairdresser* at New Style.

13 13 At the hearing of the appeal, Ms Aulakh did not oppose leave to amend being granted, but said that the Minister needed leave to rely on the proposed new ground, as it raises a new argument that was not raised below. In our view, it is appropriate to consider the question of leave to amend and the question of leave to rely on the proposed new ground together: if the Minister is not permitted to rely on the proposed new ground, this would be a telling reason to refuse leave to amend.

14 14 In our view, Ms Aulakh is correct to say that the proposed new ground raises a new argument that was not raised below, and therefore that leave is required. Ms Aulakh's case below proceeded on the basis that the Tribunal had made a finding to the effect that Ms Aulakh had not been employed at New Style at all, and the Minister did not dispute that interpretation of the Tribunal's reasons. In these circumstances, for the Minister now to contend that the Tribunal's reasons should be interpreted differently is to raise a new argument on appeal.

15 15 However, we would grant the Minister leave to rely on the proposed new ground. The proposed new ground concerns the correct interpretation of the Tribunal's reasons: cf *Coulton v Holcombe* (1986) 162 CLR 1 at 8, citing *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319. The contention is not one that, had it been raised below, could have been met by the calling of evidence: cf *Coulton v Holcombe* at 7-8; *Water Board v Moustakas* (1988) 180 CLR 491 at 497. Further, for the reasons set out below, we consider the Minister's (new) contention as to the correct interpretation of the Tribunal's reasons to have merit. There would be difficulties if this Court were required to consider the appeal on the basis of an interpretation of the Tribunal's reasons that it considered to be incorrect. In these circumstances, the interests of justice favour the Minister being permitted to rely on the proposed new ground and leave to amend being granted.

16 We note for completeness that we are not persuaded by the submission, advanced by Ms Aulakh, that leave to raise the proposed new ground should be refused because there is no automatic right of appeal from a judgment of this Court exercising appellate jurisdiction, unlike the position with respect to the Federal Circuit Court at first instance: see *AAMI5 v Minister for Immigration and Border Protection* (2015) 231 FCR 452 at [14]. Without ruling out the possibility that this consideration may have a bearing in some cases, in the circumstances of this case it is outweighed by the factors referred to above.

17 Accordingly, we would grant the Minister leave to amend his notice of appeal to insert paragraph 1(b) and to rely on this new ground.

Consideration

18 At the hearing of the appeal, we heard full argument on proposed paragraph 1(b) of the notice of appeal. It is convenient to consider paragraph 1(b) before considering paragraph 1(a).

19 The threshold issue is the correct interpretation of the Tribunal's reasons. Did the Tribunal make a finding to the effect that Ms Aulakh had not been employed at New Style at all, or did the Tribunal make a finding that she had not been employed as a hairdresser at New Style? The principal paragraph for the purposes of considering this issue is [48] of the Tribunal's reasons, which is set out above. Of course, this needs to be read in the context of the Tribunal's reasons as a whole.

20 For the reasons that follow, we consider the correct interpretation of the Tribunal's reasons to be that it made a finding that Ms Aulakh had not been employed as a hairdresser at New Style.

21 First, this is the natural meaning of the words used in [48] of the Tribunal's reasons. The Tribunal stated that it was not satisfied that Ms Aulakh had been employed "as a hairdresser" at New Style. The Tribunal then expressly found that she had not been employed "as a hairdresser" at New Style during the period claimed. The words "as a hairdresser" also appear in the last sentence of the paragraph.

22 Secondly, it was sufficient, for the purposes of determining the issue before the Tribunal, to decide whether or not Ms Aulakh had been employed *as a hairdresser* at New Style. If she had not been employed at New Style in that capacity, the work reference letter

was false or misleading in a material particular. It seems unlikely that the Tribunal would have decided more than it needed to decide.

23 23 Thirdly, the context of the Tribunal's reasons as a whole tends to support the view that the Tribunal's finding was to the effect that Ms Aulakh had not been employed *as a hairdresser* at New Style. In particular:

- (a) (a) At [13], the Tribunal discussed evidence about whether Ms Aulakh performed certain other duties "rather than duties associated with hairdressing".
- (b) (b) At [21], when discussing three customer references that had been relied on by Ms Aulakh, the Tribunal framed the issue in terms of working "as a hairdresser" at New Style during the period claimed.
- (c) (c) At [23], the Tribunal stated that if the customer references were false, this raised serious concerns as to whether Ms Aulakh worked "as a hairdresser" at New Style during the period claimed. Both [21] and [23] of the Tribunal's reasons use the words "as a hairdresser". We consider these paragraphs to be, at least, consistent with the interpretation we favour.
- (d) (d) In the last sentence of [23], the Tribunal stated that the failure by Ms Aulakh to refer to employment at New Style in her visa application raised further doubts as to whether she was employed there "as a hairdresser". The use of these words is, at least, consistent with the interpretation we favour.
- (e) (e) One of the areas of inconsistency between Ms Aulakh's evidence and that of Ms Bajaj (the owner of New Style) concerned the percentage of Ms Aulakh's work that was hairdressing, as discussed at [29].
- (f) (f) At [30], the Tribunal referred to the fact that Ms Aulakh's work reference stated that she was employed "as a hairdresser" and then discussed evidence concerning the nature of Ms Aulakh's work at New Style.

24 24 At [49] of its reasons, the Tribunal stated that the work reference letter was "false at the time it was given". We do not consider this to take the matter further one way or the other. To state that the work reference is "false" is neutral on the issue of interpretation.

25 25 It is true that, at [41], the Tribunal stated that the report prepared by Departmental investigators raised concerns "in relation to [Ms Aulakh's] employment at New Style".

However, this statement is neutral as to the issue of interpretation. It is capable of referring to whether she had been employed as a hairdresser at New Style. Indeed, based on the summary of the report at [13] of the Tribunal's reasons, the issue raised by the report concerned the nature of Ms Aulakh's duties at New Style, and the investigators expressly noted their satisfaction that she had duties at the salon.

26 26 Similarly, the reference in the first sentence of [43] of the Tribunal's reasons to there being "an issue in relation to [Ms Aulakh's] employment at New Style" is neutral on the issue of interpretation. This may refer to whether Ms Aulakh had been employed there at all, or whether she had been employed there as a hairdresser.

27 27 We accept that the second sentence of [43] of the Tribunal's reasons, and the last sentence of that paragraph, support the view that the Tribunal was concerned with whether Ms Aulakh "worked at New Style" (ie, whether she worked there at all). But this needs to be seen in the context of the other parts of the Tribunal's reasons, referred to above. While the Tribunal appears to have had some doubts as to whether Ms Aulakh worked there at all, ultimately its finding at [48] was more limited.

28 28 We note that at [24] of the Tribunal's reasons it referred to a number of inconsistencies in the evidence. The Tribunal then discussed these at [26]-[32]. It is true that only one of these expressly went to the nature of Ms Aulakh's duties at New Style. However, they could still be used as a basis for doubting her credibility generally, and thus calling into question whether she was employed as a hairdresser at New Style for the claimed period. Hence, we consider this to be neutral on the interpretation issue.

29 29 We note also that the Tribunal did not make findings as to what other duties Ms Aulakh did perform at New Style. However, we do not consider that it was necessary for the Tribunal to make such additional findings in order to conclude that Ms Aulakh had not been employed as a hairdresser at New Style. We therefore do not consider that the absence of such additional findings assists in resolving the interpretation issue.

30 30 In the course of argument, reference was made to the judgment of the Full Court in *Minister for Immigration and Border Protection v SZVFW* (2017) 248 FCR 1. An application for special leave to appeal from that decision was granted; the appeal has been heard by the High Court and is currently reserved. The Full Court, at [44], expressed the view that the primary judge's finding that the Tribunal's decision was unreasonable in the legal sense was

“fundamentally a decision which turned on her Honour’s evaluative judgment”. We do not consider that reasoning to have application to the issue of interpretation of the Tribunal’s reasons, at least in the present case. The interpretation issue is qualitatively distinct from the question of unreasonableness in the legal sense.

31 31 If the interpretation of the Tribunal’s reasons set out above is correct, then the primary judge erred in his interpretation of the Tribunal’s reasons (although, in fairness to the primary judge, it should be noted that neither side advanced, or clearly advanced, this interpretation below). The premise for his Honour’s consideration of ground 1 of the application below thus falls away, and it is necessary for this ground to be considered afresh. It is appropriate that this be done by this Court.

32 32 Ground 1 of Ms Aulakh’s further amended application before the Federal Circuit Court was to the effect that the Tribunal’s decision was affected by jurisdictional error because the Tribunal’s conclusion that Ms Aulakh had not been employed as a hairdresser at New Style was illogical and irrational. In the particulars to this ground, Ms Aulakh relied on the following contentions:

- (g) (a) The Tribunal’s finding was in conflict with evidence cited in the decision record (and not discredited) that officers of the Minister in New Delhi after seeking to verify Ms Aulakh’s employment at New Style were satisfied that she undertook duties at New Style including cutting, styling and straightening of hair, which duties fall within an ordinary, widely used definition of a “hairdresser”.
- (h) (b) Contrary to the Tribunal’s finding, the evidence adduced for Ms Aulakh proved that, despite some inconsistencies about how she worked at New Style and how work references came to be prepared, Ms Aulakh was employed by New Style.
- (i) (c) If Ms Aulakh was employed by New Style, then: the work reference letter was not false; Ms Aulakh did not give or cause to be given to TRA information that was false or misleading in a material respect; and Ms Aulakh did not give or cause to be given to the Minister or to an officer of the Department a bogus document in relation to the application for the visas.

33 33 Proceeding on the basis of the interpretation of the Tribunal's reasons set out above, the decision of the Tribunal was not illogical or irrational: see *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [130] per Crennan and Bell JJ. As set out in the Tribunal's reasons, there was evidence and reasoning to support the finding that Ms Aulakh had not been employed as a hairdresser at New Style: see the Tribunal's reasons at [19], [22]-[23], [24]-[32], [36] and [40]-[42]. It was open to the Tribunal to rely on that evidence and reasoning and to make the finding that it did. The finding of the Tribunal, and the conclusions it reached on the basis of that finding, were not vitiated on the basis of illogicality or irrationality.

34 34 It follows from the above that we would uphold ground 1 on the basis of paragraph 1(b) of the amended notice of appeal. It is unnecessary to consider paragraph 1(a). We would make orders to the effect that:

- (j) (a) The Minister have leave to amend his notice of appeal to the form of the proposed amended notice of appeal set out in annexure "AC-8" to the affidavit of Adam Cunynghame affirmed 31 August 2017.
- (k) (b) The notice of appeal be treated as amended accordingly.
- (l) (c) The appeal be allowed.
- (m) (d) The orders of the primary judge be set aside and in lieu thereof it be ordered that the application be dismissed.

35 35 In relation to costs (both of the appeal and the proceeding at first instance), we would provide a short period of time for the parties to file and serve short written submissions, with a view to this issue being dealt with 'on the papers'.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey and Moshinsky.

Associate:

Dated: 19 June 2018

REASONS FOR JUDGMENT

MORTIMER J:

36 36 The Minister appeals from orders of the Federal Circuit Court quashing a decision of the Migration Review Tribunal (as it then was). The Tribunal had affirmed a primary decision refusing the grant of a Skilled (Residence) (Class VB) subclass 886 (Skilled – Sponsored) visa to the first respondent, Ms Aulakh, on the basis that the Tribunal’s decision was affected by jurisdictional error. Each of the second, third and fourth respondents are members of Ms Aulakh’s family, being, respectively, her son, her daughter and her partner, and were included as family members in her application for the visa.

37 37 The refusal was based on a finding by the delegate that Ms Aulakh did not satisfy Public Interest Criterion 4020 because she had given, or had caused to be given, a bogus work reference in support of her visa application.

38 38 On judicial review, the Federal Circuit Court upheld all three grounds of judicial review advanced by Ms Aulakh. It found the Tribunal’s decision was legally unreasonable, that it ignored relevant evidence and relied on irrelevant material, and that it failed in its statutory duty to “fully and frankly review” the delegate’s decision. The Minister challenges each of these findings.

39 39 The Minister’s appeal focussed on the interpretation to be given to one paragraph in the Tribunal’s reasons. Ultimately, I have concluded the Minister’s interpretation of that paragraph should not be accepted, but the Minister’s other grounds (which occupied less time during the appeal) should succeed.

40 40 For the reasons set out below, the appeal should be allowed.

BACKGROUND

41 41 In November 2006, Ms Aulakh, while living in India, made an offshore application for a Skilled – Independent (Migrant) (Class BN) subclass 136 visa. As part of this application, she had previously obtained, in August 2006, a skills assessment issued by Trades Recognition Australia (TRA). TRA assessed Ms Aulakh under the category of hairdresser. Ms Aulakh’s visa application was refused in October 2007, apparently based on

findings arising from a site visit conducted by the officers of the Australian High Commission in May 2007, to which I refer below. She subsequently entered Australia on a student visa.

42 42 On 29 June 2010, in Australia, Ms Aulakh made an onshore application for a Skilled (Residence) (Class VB) subclass 886 (Skilled – Sponsored) visa, including in that application the third and fourth respondents, her daughter and her partner respectively. She applied again in the category of hairdresser. Her son, the second respondent, was born in February 2012, and was subsequently included in the application in May 2013, following a request from the respondents' migration agent. As part of this application, Ms Aulakh supplied the Department with (amongst other documents) customer references, a work reference dated 10 October 2007 and the August 2006 skills assessment issued by TRA. The October 2007 work reference had been used by Ms Aulakh for her previous visa application. A replacement skills assessment, identical to the first, was issued by the TRA on 10 June 2010, and this was also included in her application. It appears from the evidence that the first skills assessment was misplaced by Ms Aulakh. The work reference and both TRA skills assessment were based on Ms Aulakh's claim that she worked at an establishment called New Style Beauty Parlour & Coaching Centre in a town in the Punjab in India. The Department sought confirmation from the TRA that the skills assessment letters were authentic, which the TRA confirmed on 20 June 2013.

43 43 As I have noted, in connection with her offshore visa application in 2006, officers of the Australian High Commission in New Delhi had made a site visit to New Style on 7 May 2007, to conduct checks on Ms Aulakh's claims

44 44 There was a substantial delay in processing Ms Aulakh's visa application. Although it was lodged in June 2010, it was not "referred" to a delegate until mid-2013, a period of three years. The explanation given to Ms Aulakh's migration agent was:

Departmental records indicate that Ms Aulakh's application was first allocated to a case officer on 20 May 2013. As this application has only recently come before a delegate of the Minister for assessment against the relevant legislative criteria, including PIC 4020; the claims and supporting evidence provided by the applicant against these criteria had yet to be tested.

As you may be aware priority processing directions issued by the Minister and programme limitations on the number of available places have meant that many applications have experienced considerable delays before their applications are assessed by the department. I can confirm that these factors have impacted the department's ability to allocate and assess Ms Aulakh's application prior to 20 May

2013.

Whilst I understand your concern regarding the delay between when the previous information uncovered by the department was presented to Ms Aulakh. The invitation to comment issued by the Visa Processing Officer on 18 October 2013 explains in considerable detail why PIC 4020 has been enlivened in this instance, despite the age of the information on which this finding relies.

45 45 On 18 October 2013, the delegate wrote to Ms Aulakh informing her of “unfavourable information” held by the delegate in relation to her visa application, and notifying her that the delegate was “not satisfied that you provided genuine work experience documents to TRA in obtaining your skills assessment”. The letter invited her to comment on the information. I note that this letter was sent over six years after the site visit was undertaken at New Style.

46 46 The letter asserted that as a result of the site visit in May 2007, conducted for the purposes of her previous visa application, the High Commission officers had concluded:

- 0 • The referee listed in Ms Aulakh’s work reference letter, Ms Reeta Bajaj (who was the owner of New Style), confirmed she had not written the letter and was not aware of its contents;
- 1 • Ms Bajaj could not produce evidence to support Ms Aulakh’s claim that she had been undertaking the full range of duties as a hairdresser, as defined in ASCO Code 4931-11 (that is, the Australian Standard Classification of Occupations);
- 2 • Ms Bajaj confirmed that the business primarily provided beauty treatments and that Ms Aulakh performed those duties, rather than hairdressing;
- 3 • Ms Bajaj confirmed Ms Aulakh was not employed in a full time position; and
- 4 • While the officers found that Ms Aulakh performed some of the duties defined by the ASCO Code, she did not perform a large number of them, such as providing advice on hair care, and providing treatments such as shampooing, colouring or scalp conditioning.

47 47 When compared with the site visit report itself, which was before the Tribunal, the Federal Circuit Court and is before this Court, the summary given by the delegate is somewhat incomplete. The material parts of the report are as follows:

Please read this report in conjunction with [file number redacted] Aulakh.

...

Owner stated that the duties of each applicant including PA is:

- • haircutting
- • hair styling
- • colouring
- • perming
- • straightening
- • bonding; and
- • Highlighting.

During their free time all her hairdressers including PA assist with make-up.

...scope for hairdressing is low.

...

...In regards to the reference letter the owner (signatory) stated that information was furnished by the applicants and she only signed the letter. Signatory is not fully aware of the contents of the reference letter.

...

Conclusion-

“ Without any documentary evidence I am unable to conclusively say that PA has been working at the parlour for the term stated in the referee letter.

“ Parlour lacks proper facilities, any training or experience gained at this parlour will be sub-standard.

“ Owner informed me that all applicants, including PA perform more beauty tasks than hairdressing and that each applicant only works 4 hours per day.

...I am not satisfied that PA meets the skilled level required and envisaged at the ASCO code.

Outcome- Not genuine.

48 48 It is difficult to see how the officer reaches the conclusion of “not genuine” on the basis of what is in the report. A conclusion of insufficient experience might appear to have some basis, but genuineness does not appear to have any basis in the report. I refer to this not to enter a debate about the delegate’s fact-finding, but because the contents of this report are relevant to understanding the key passage in the Tribunal’s reasons. The key point is that there are some inconsistencies in, and uncertainties about, the source documents used in the Tribunal’s review.

49 49 On 6 November 2013, the respondents' new agent requested access to information from the Department. An extension of time was granted for the response to the 18 October 2013 letter, on the basis of the request for information.

50 50 On 19 December 2013, a response to the 18 October 2013 letter was provided by the respondents' agent to the delegate. The response challenged, inter alia, the length of time between the site visit and the issues raised in the 18 October 2013 letter concerning the work experience documents provided by Ms Aulakh, the fact that the site visit occurred prior to the second visa application, inconsistencies between the TRA's assessment and the Department's assessment, and the insufficiency of detail in the site visit report, including the lack of photos and the lack of evidence that the referee had been shown the letter which was purported to be written by her.

51 51 On 23 January 2014, a delegate of the Minister refused the grant of the visa to Ms Aulakh on the basis that false or misleading information was provided in respect of the work reference, and therefore PIC 4020 was not met. The delegate placed little weight on Ms Aulakh's 19 December 2013 response on the basis that the majority of the comments "do not address the true findings of the investigation." As no further information had been provided, the delegate made the decision based on the information available. The delegate also refused the grant of visas to Ms Aulakh's family members.

Tribunal's decision

52 52 The respondents applied for a review of the delegate's decision on 30 January 2014. Ms Aulakh and Mr Singh, her partner, appeared before the Tribunal on 21 May 2014 to give evidence and present arguments. Ms Bajaj, the referee from New Style, also gave evidence by telephone from Canada.

53 53 During the review hearing and pursuant to s 359AA of the *Migration Act 1958* (Cth), the Tribunal provided information orally to the respondents regarding the inconsistencies it saw in the material presented. At the conclusion of the hearing on 21 May 2014, and on the same day, the Tribunal sent a letter pursuant to s 359A to the respondents' agent. The letter provided information that was relevantly the same as the information given orally, save for an additional point in relation to the opening times of New Style. The letter invited Ms Aulakh to comment on a number of particulars of information coming out of the 21 May 2014 hearing, including:

- 5 • what was said to be inconsistent evidence between Ms Aulakh and Ms Bajaj as to whether the work reference was prepared in Punjabi and translated into English, or whether it was prepared in English by Ms Bajaj;
- 6 • what was said to be inconsistent evidence between Ms Aulakh and Ms Bajaj as to the opening times of New Style – in particular, Ms Aulakh gave evidence that it was 10 am to 5 pm, while Ms Bajaj claimed it was 10 am to 7 pm;
- 7 • what was said to be inconsistent evidence between Ms Aulakh and Ms Bajaj as to Ms Aulakh's break times – Ms Aulakh claimed she had a break between 2 pm to 4 pm, while Ms Bajaj claimed she did not have much of a break because customers came in on a continuous basis; and
- 8 • Ms Bajaj's evidence about an employee attendance register which she kept.

54 54 On 4 June 2014, following an extension of time being granted to the respondents, the respondents' agent provided a response to the s 359A and s 359AA invitations. The agent submitted that any inconsistency in relation to the work reference was due to a "failure of recollection", given that the reference was given eight years ago in June 2006. The agent further submitted that during the questioning of Ms Aulakh, she was not provided a copy of the written reference, and the line of questioning adopted by the Tribunal in those circumstances was therefore "not optimal".

55 55 On 30 June 2014, the Tribunal affirmed the delegate's decision to refuse the grant of the visa. It did not accept the respondents' submissions set out at [54] above. This was largely on the basis that the Tribunal considered that when Ms Aulakh was asked a question that she could not remember the answer to, she said so. When she answered the questions regarding the reference, she did not indicate that she could not remember, or that she was uncertain. The same finding was made in relation to Ms Bajaj. The Tribunal also considered that the submission did not address some of the inconsistencies that it had raised.

56 56 The Tribunal's decision was made on the basis of a number of findings. That fact is integral to the Minister's submissions on the appeal.

57 57 First, it found (at [22]) that the customer references included as part of the application were not authentic. These references were not the subject of consideration before the delegate. The Tribunal based its finding on the fact that the three references were written in the same font and formatting, and contained almost identical wording.

58 58 Second, the Tribunal made the following finding (at [48]). This is the key finding for the purposes of the Federal Circuit Court's decision, and the Minister's appeal:

Having considered all the evidence, individually and cumulatively, and the submissions made by the applicants' migration agent, the Tribunal is not satisfied that the first named applicant was employed as a hairdresser at New Style Beauty Parlour and Coaching Centre. The Tribunal finds that the first named applicant was not employed as a hairdresser at New Style Beauty Parlour and Coaching Centre from 1 July 1998 to September 2007. Therefore, the Tribunal finds that the work reference from New Style Beauty Parlour and Coaching Centre dated 24 June 2006 was false as the first named applicant was not employed as a hairdresser at New Style Beauty Parlour and Coaching Centre from 1 July 1998 to 24 June 2006.

59 59 The question is what the Tribunal meant by "the Tribunal is not satisfied that the named applicant was employed as a hairdresser at New Style Beauty Parlour and Coaching Centre". Did it mean Ms Aulakh was not employed at New Style at all? Or did it mean that Ms Aulakh was employed there, but not as a hairdresser?

60 60 The Federal Circuit Court found it was the former. The Minister contends on appeal it is the latter. The respondents submit it was open to the Federal Circuit Court to conclude it was the former, and no appellable error is disclosed in that approach.

61 61 The Tribunal set out a number of reasons for this finding, including that:

- 9 • Ms Aulakh did not list New Style in the "Applicant past employment" section of her visa application, despite it being within the four year period of her filing of the visa application (at [23]);
- 10 • there were inconsistencies between the evidence given by Ms Aulakh and Ms Bajaj in relation to issues such as the days and times that Ms Aulakh worked, when she took her lunch breaks, when she left the employ of New Style, the mixture of hair and beauty work that she undertook, the opening hours of New Style, the staff who worked there and the clients who attended (at [24], [26]-[32]);
- 11 • there were inconsistencies in the evidence given by Ms Aulakh and Ms Bajaj in relation to the preparation of the work reference (at [25]); and
- 12 • there were inconsistencies between Ms Bajaj's evidence and the Department's record of the site visit in May 2007 (at [29]-[30], [41]-[42]).

62 The Tribunal went on to find that the reference from New Style was false and that it was false or misleading in a material particular. It expressed its finding in the following way at [49]:

The Tribunal finds that the work reference from New Style Beauty Parlour and Coaching Centre dated 24 June 2006 was false at the time it was given. The Tribunal finds that the first named applicant has given, or caused to be given, to TRA the work reference from New Style Beauty Parlour and Coaching Centre dated 24 June 2006 for the purpose of obtaining a skills assessment as a hairdresser. The Tribunal finds that she applied for a skills assessment as a hairdresser for the purpose of meeting the requirements of cl.886.223 in relation to her visa application. Clause 886.223(1) requires that her skills have been assessed by the relevant assessing authority (TRA) as suitable for her nominated skilled occupation.

63 This led the Tribunal to conclude (at [50]) Ms Aulakh had given, or caused to be given to the TRA, as an assessing authority, information that was false or misleading in a material particular: namely, the information in the work reference. As the skills assessment and confirmation letter from the TRA were based on the work reference, the Tribunal found that the August 2006 skills assessment and the subsequent confirmation of the skills assessment in July 2010 were bogus documents within the definition of s 97 of the Migration Act at the time, as they were obtained because of a false or misleading statement. While it may be somewhat curious for the Tribunal to find that two documents produced by a statutory authority were “bogus” documents, I infer the Tribunal was describing how the consequence of its finding about the work reference flowed through to the information provided by the TRA to the Minister. This aspect of its reasoning was not impugned before the Federal Circuit Court.

64 Finally, the Tribunal considered there were no compelling circumstances under PIC 4020(4), and that the requirements under PIC 4020(1) should therefore not be waived.

65 Before turning to the Federal Circuit Court’s decision, it is necessary to consider the relevant legislative provisions.

LEGISLATIVE FRAMEWORK

66 The general power to grant or refuse visas is provided for in s 65 of the Migration Act. At the time of the Tribunal’s decision, this section provided:

65 Decision to grant or refuse to grant visa

(1) After considering a valid application for a visa, the Minister:

- (a) if satisfied that:
 - (i) the health criteria for it (if any) have been satisfied; and
 - (ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and
 - (iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and
 - (iv) any amount of visa application charge payable in relation to the application has been paid;is to grant the visa; or
- (b) if not so satisfied, is to refuse to grant the visa.

Note: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

- (2) To avoid doubt, an application put aside under section 94 is not taken for the purposes of subsection (1) to have been considered until it has been removed from the pool under subsection 95(3).

67 67 The criteria prescribed for the Skilled (Residence) (Class VB) subclass 886 (Skilled – Sponsored) visa at the time of the application in June 2010 included cl 886.225, contained in Sch 2 to the *Migration Regulations 1994* (Cth). Schedule 4, Pt 1 of the Migration Regulations, which provided for public interest criteria, was amended in April 2011, by the *Migration Amendment Regulations 2011 (No. 1)* (Cth) to introduce PIC 4020. Regulation 5(2) of the Amendment Regulations provided that those amendments would apply to an application for a visa made before 2 April 2011, but not finally determined. Subclass 886 visas were abolished in 2012. The relevant point-in-time to consider the criteria for subclass 886 visas was therefore as they stood before the visa class was abolished. This is the version considered by the delegate.

68 68 Clause 886.225 fell under the heading “Criteria to be satisfied at time of decision” and provided:

The applicant:

- (a) satisfies public interest criteria 4001, 4002, 4003, 4004, 4005, 4010 and 4020; and
- (b) if the applicant had turned 18 at the time of application — satisfies public

interest criterion 4019.

69 69 PIC 4020, in Sch 4 of the Migration Regulations provided:

- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
 - (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse the application;the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1) (a) or (b) and subclause (2) if satisfied that:
 - (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;justify the granting of the visa.

- (5) In this clause:

information that is false or misleading in a material particular means information that is:

- (a) false or misleading at the time it is given; and
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Note Regulation 1.03 defines ***bogus document*** as having the same meaning as in section 97 of the Act.

70 70 Section 97 of the Migration Act at the relevant time defined “bogus document” in the following way:

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

71 71 Finally, before the Federal Circuit Court the respondents also challenged the Tribunal’s decision on the basis of s 348 and s 357A of the Migration Act. The relevant point-in-time to consider these provisions is as at the date of the Tribunal’s decision – that is, as at 30 June 2014. Those sections then provided:

348 Migration Review Tribunal must review decisions

- (1) Subject to subsection (2), if an application is properly made under section 347 for review of an MRT-reviewable decision, the Tribunal must review the decision.
- (2) The Tribunal must not review, or continue to review, a decision in relation to which the Minister has issued a conclusive certificate under section 339.

357A Exhaustive statement of natural justice hearing rule

- (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
- (2) Sections 375, 375A and 376 and Division 8A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.
- (3) In applying this Division, the Tribunal must act in a way that is fair and just.

FEDERAL CIRCUIT COURT DECISION

72 72 In summary, the respondents sought judicial review of the Tribunal’s decision on three grounds:

- (2) (1) the Tribunal’s conclusion that Ms Aulakh was not employed as a hairdresser at New Style was illogical and irrational;

(3) (2) the Tribunal's conclusion that Ms Aulakh was not employed as a hairdresser at New Style was made on the basis of the Tribunal failing to ask appropriate questions, ignoring relevant material and relying on irrelevant material; and

(4) (3) the Tribunal failed to comply with s 348 and s 357A of the Migration Act in that it failed to fully and fairly review the delegate's decision.

73 73 As the respondents noted in their submissions to this Court, the substantive and central plank of the first two grounds of review before the Federal Circuit Court was that the Tribunal had found that Ms Aulakh was not employed at New Style at all.

74 74 There is no doubt that is how the respondents framed their case before the Federal Circuit Court. For example, in their written submissions to the Federal Circuit Court (at [15]), they contended:

In this way, the decision is ultimately founded on MRT's finding that Ms Aulakh did not work at New Style.

75 75 Later in the same document, having identified the grounds of review advanced the respondents submitted (at [21]):

When consideration is given to the evidence that was before the MRT, the transcript of the hearing and the finding in the MRT Decision, it is submitted that the MRT Decision was legally unreasonable and affected by jurisdictional error. The findings of the MRT (**particularly its finding that Ms Aulakh did not work at New Style**) cannot be reasonably justified by the evidence, and so the logic of the decision falls away. (emphasis added)

76 76 The Minister accepted on the appeal that the respondents had framed their judicial review application in this way. One of the debates about the Minister's first and second grounds of appeal in this Court was whether the Minister's case before the Federal Circuit Court had also been framed on this assumption, and therefore that what the Minister sought to advance before this Court was inconsistent with the case put on his behalf before the Federal Circuit Court.

77 77 The Federal Circuit Court accepted that each of the respondents' grounds of judicial review had been made out, and held that the Tribunal's decision was affected by jurisdictional error.

78 78 First, the Court reviewed the transcript of the evidence before the Tribunal and agreed with Ms Aulakh's counsel that the questions put to Ms Aulakh by the Tribunal were

“ambiguous, open-ended, double-barrelled or were otherwise confusing”, and that her evidence was consistent with Ms Bajaj’s evidence, as well as her partner’s evidence (at [16]-[17]). The Court considered in some detail each of the key points of evidence and found that the evidence was broadly consistent with Ms Aulakh’s account.

79 79 The Court accepted (at [25]) that the style of questioning adopted by the Tribunal of Ms Bajaj was confusing, all the more so because Ms Bajaj gave evidence through an interpreter. On this point, the Court noted the Tribunal’s style of questioning changed from being open questions to questions phrased as “you are reported to have said” a particular thing. The Tribunal did so, the Court found, without making it clear that it wanted to pursue with Ms Bajaj matters that had emerged from her evidence that were inconsistent with her responses given earlier in May 2007. In particular, the Court identified the following question, directed by the Tribunal to Ms Bajaj, as being expressed “very badly”:

Did she prepare it in Punjabi and give it to you and then you did it in English or did you prepare it in Punjabi and give it to her and see — have translated into English?

(Footnote omitted.)

80 80 The Federal Circuit Court said, in relation to this question:

It was a compound question of the less desirable category. I counted at least six propositions in that seemingly simple question. Ms Bajaj could not have answered it without explanation, either affirmatively or negatively, because whichever answer may have been given could not have assisted having regard to the unacceptably high number of concepts embedded in the question itself.

81 81 The Court concluded (at [35]-[37]), in respect of ground 1, that the Tribunal’s finding that Ms Aulakh was not employed as a hairdresser by New Style was erroneous and that, applying *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332, it was a conclusion that “no reasonable Tribunal acting reasonably could have reached”. The Court found that the Tribunal had only challenged Ms Aulakh about “peripheral matters”, and did not confront her with the concept that she had not worked at New Style at all. It is worthwhile extracting [34], [35] and [37] of the Federal Circuit Court’s reasons, as they demonstrate that the Federal Circuit Court accepted the central plank of the respondents’ judicial review application that the Tribunal had found Ms Aulakh never worked at New Style:

In paragraph 48 of its reasons the Tribunal said it was not satisfied the first applicant was employed as a hairdresser at New Style.

In my view, that conclusion was erroneous. It was not supported by the evidence.

Based on the evidence I have catalogued below, no reasonable Tribunal acting reasonably could have reached the conclusion that the Tribunal reached in paragraph 48 of its reasons.

...

On the facts of this case, in my judgment the conclusion that the first applicant did not work at New Style, recorded at paragraph 48 of the Tribunal's reasons, was so unreasonable that no reasonable repository of the power to make such a decision could have reached the decision that the Tribunal made in this case.

82 82 In respect of ground 2, the Court observed (at [42]-[43]) that its findings of fact in relation to ground 1 were largely common to those in ground 2. That is despite ground 1 being an illogicality/irrationality ground and ground 2 alleging jurisdictional error in the way the Tribunal approached its fact-finding. The Federal Circuit Court added (at [44]):

...the Tribunal ignored the evidence of Ms Bajaj, a witness whose evidence most tellingly spoke of the fact that the first applicant not only worked at New Style but that the first applicant worked in that salon in the capacity as a hairdresser performing the tasks and functions ordinarily associated with those of a hairdresser.

83 83 In respect of ground 3, which the Court noted it was not strictly necessary for it to consider having regard to its findings in respect of grounds 1 and 2, the Court considered that the Tribunal did not conduct a fair hearing. At [48]-[49], it said:

...in my view the Tribunal conducted this hearing in a peculiar manner. There was no evidence on the transcript that the Tribunal made available to the first applicant the precise information obtained or supplied by the Australian High Commission officers. The Tribunal paraphrased the information on which those officers had allegedly reported, but at no stage was the precise information laid out for the examination of the first applicant or her solicitor. The first applicant and her solicitor had no basis for assessing whether the Tribunal's paraphrasing of the information said to have been "*reported*", as the Tribunal described it, was correct in fact.

The first applicant should have been able to verify whether the matters allegedly "*reported*" by the Australian High Commission officers was correctly captured in the Tribunal's questioning. By being denied the document that the Tribunal was paraphrasing or the source of the information allegedly "*reported*", the first applicant was denied the opportunity of verifying whether the Tribunal's paraphrasing of the matters was accurate. In my view, the first applicant was thereby denied a significant forensic opportunity in this case.

THE GROUNDS OF APPEAL

84 84 Initially, the Minister identified three grounds of appeal:

1. The Federal Circuit Court erred in concluding that the Fifth Respondent committed jurisdictional error by unreasonably concluding that the First

Respondent was not employed as a hairdresser at New Style Beauty Parlour and Coaching Centre because:

- a. in concluding that the Fifth Respondent had made an unreasonable factual finding the Federal Circuit Court ignored important aspects of the Fifth Respondent's reasoning, in particular, the weight that it gave to:
 - i. its conclusion that the First Respondent and a witness, Ms Reeta Bajaj, gave inconsistent evidence about the circumstances in which a reference was produced;
 - ii. its conclusion that customer references were not authentic; and
 - iii. the fact that the First Respondent [sic] did not list her employment at New Style in her visa application.
2. The Federal Circuit Court erred in concluding that the Fifth Respondent committed jurisdictional error by ignoring relevant evidence because there was no basis to infer that the evidence of the witness, Ms Reeta Bajaj, had not been considered by the Fifth Respondent.
3. The Federal Circuit Court erred in concluding that the Fifth Respondent committed jurisdictional error by finding that the Tribunal breached ss 348 and 357A of the *Migration Act 1958* because there was no obligation on the Fifth Respondent to give to the First Respondent the report, or particulars of the report, prepared by officials from the Australian High Commission because that report was annexed to submissions made to the Tribunal by the First Respondent's representative dated 13 May 2014.

85 85 When the appeal commenced on 15 August 2017, the Court was informed that the respondents had objected to the Minister's written submissions travelling, they contended, outside the grounds of appeal as expressed. Accordingly, the Minister sought leave to amend his notice of appeal. The grant of leave was opposed by the respondents. No interlocutory application was filed, and the Minister's application was unsupported by any affidavit material. Moreover, it became apparent that, because of the nature of the amended ground, and its relationship to the way the judicial review application was conducted before the Federal Circuit Court, the respondents would need access to the transcript of the hearing before the Federal Circuit Court, which they did not have. It was clear the appeal could not proceed on that day, and it was adjourned, with an order that the Minister pay the respondents' costs of the day's hearing.

86 86 When the appeal recommenced on 22 February 2018, the Minister had filed an interlocutory application, a supporting affidavit, a further supplementary appeal book

containing, among other things, transcript of the Tribunal hearing and submissions in support of the interlocutory application. The respondent had also filed submissions.

87 87 The proposed amendment to the notice of appeal was in the form of an addition to the existing ground 1, and was expressed to be a sub-paragraph of ground 1, so that ground 1 now read (with the proposed amendment underlined):

1. The Federal Circuit Court erred in concluding that the Fifth Respondent committed jurisdictional error by unreasonably concluding that the First Respondent was not employed as a hairdresser at New Style Beauty Parlour and Coaching Centre because:
 - a. in concluding that the Fifth Respondent had made an unreasonable factual finding the Federal Circuit Court ignored important aspects of the Fifth Respondent's reasoning, in particular, the weight that it gave to:
 - i. its conclusion that the First Respondent and a witness, Ms Reeta Bajaj, gave inconsistent evidence about the circumstances in which a reference was produced;
 - ii. its conclusion that customer references were not authentic; and
 - iii. the fact that the ~~Frist~~ First Respondent did not list her employment at New Style in her visa application.
 - b. in concluding that the Fifth Respondent had made an unreasonable factual finding the Federal Circuit Court erred in its construction of the Fifth Respondent's reasons:
 - i. the Federal Circuit Court held that the Fifth Respondent found that the First Respondent had not ever worked at New Style Beauty Parlour and Coaching Centre;
 - ii. when the Fifth Respondent's reasons are properly construed the Fifth Respondent found that the First Respondent had not worked at New Style Beauty Parlour and Coaching Centre as a hairdresser.

88 88 Counsel for the respondents informed the Court that the respondents did not object to leave being granted for the filing of the amended notice of appeal, but reserved their position to submit that the new limb presented a new argument, and that the amendment ought not be allowed in accordance with various authorities to which they referred the Court in their written submissions.

89 89 The Court informed the parties it would reserve consideration of the Minister's application and deal with it in the Court's final reasons on the appeal. The appeal proceeded

on the basis the parties would include argument on the new limb as part of the appeal. As it turned out, this new limb was at the centre of the Minister's submissions on the appeal.

At the conclusion of the hearing of the appeal, the parties were invited by the Court to address, by way of supplementary submissions, the issue of the correct approach to the interpretation of the Tribunal's reasons for its decision. They were also invited to address whether there could only be one correct interpretation of the Tribunal's reasons, or whether this was an evaluative matter. Both parties filed additional submissions, and the Court has considered them.

RESOLUTION

On the question of leave, I do not consider leave should be granted to the Minister to raise ground 1(b) on the appeal.

As both parties accepted, grounds 1 and 2 are co-dependent, hinging as they both do on the interpretation of the Tribunal's finding at [48] of its reasons. I have not accepted the Minister's interpretation of [48] of the Tribunal's reasons, and prefer that for which the respondents contended, and the Federal Circuit Court found. Nevertheless, even with that conclusion against the Minister, I conclude grounds 1(a) and 2 should succeed. I also consider that ground 3 of the appeal should succeed.

The question of leave

The Minister's written submissions made some fine distinctions between how the matter was argued before the Federal Circuit Court, and what was being argued before this Court on appeal. Those distinctions appeared directed at refuting the proposition that the amended notice of appeal raised an argument that was "new" or not put to the Federal Circuit Court.

Nevertheless, in the alternative, the Minister submitted that if there was a new ground raised, the amendment was within the principles set out by the Full Court in *Haritos v Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315 at [79]-[83], especially at [79] where the Full Court endorsed the approach taken in *Summers v Repatriation Commission* [2015] FCAFC 36; 230 FCR 179.

I deal initially with two of the Minister's arguments, to reject them.

96 96 Despite the location of the amendment in the amended notice of appeal, I consider it is a new ground. It is a separate and independent way of challenging the conclusion of the Federal Circuit Court that the Tribunal's finding at [48] had no basis in the evidence or material before the Tribunal. The original part of ground 1 expressed a quite different challenge – that is, one based on a contention that the Federal Circuit Court ignored important aspects of the evidence.

97 97 Second, I do not accept that this new ground formed any part of the Minister's submissions before the Federal Circuit Court. Nor do I accept the Minister's submissions before the Federal Circuit Court were consistent with this ground. Rather, I consider the Minister's submissions, like those of Ms Aulakh, had as their premise that in [48] of its reasons, the Tribunal made a finding that Ms Aulakh did not work at New Style at all. The Minister's submissions before the Federal Circuit Court moved between propositions involving the qualifier "as a hairdresser" and also not involving it. In this appeal, the Minister accepted that his written submissions before the Federal Circuit Court were not clear one way or the other, although he attempted to explain this by submitting they used "short hand" modes of expression. As I have noted, the respondents' position before the Federal Circuit Court was clear, and their primary ground of review depended upon the interpretations of the Tribunal's reasons as ultimately found by the Federal Circuit Court. During the oral hearing before the Federal Circuit Court, as the Minister accepted, the respondents' counsel made it clear his clients' contention was that the Tribunal found Ms Auklah had never been employed by New Style. For example:

MR BYRNE:

...

Then, your Honour – and this is also something that your Honour will see in documents that we do come to – on page 193 it says "contrary to owner's claim that the parlour does more beauty related work the applicant claimed she performs 65 per cent hairdressing and 35 per cent beauty work". So that statement is based on an assumption of the correctness of that ambiguous paragraph we just looked at on the previous page.

HIS HONOUR: I must say I must be missing something. Why is the characterisation or attribution of percentages said to be important?

MR BYRNE: Well, it only becomes important because the MRT says those inconsistencies found **or provide a foundation for deciding that the applicant didn't work at the hairdressing salon.**

HIS HONOUR: Work at, or performing functions of?

MR BYRNE: Work at. That they say – that the conclusion drawn in the MRT – in the Delegate’s decision and then by the MRT is that the applicant never worked at this hairdressing salon in India.

HIS HONOUR: Thank you.

(emphasis added)

98 98 The Minister’s legal representative before the Federal Circuit Court made no submissions indicating whether the Minister’s position was the same as, or different to, the respondents’ position about [48] of the Tribunal’s reasons. Submissions were made about why the Tribunal’s conclusion that the work reference was bogus was not irrational or illogical, but there were no submissions that could remotely be said to approach the submission now made on behalf of the Minister. In my opinion it is understandable the Federal Circuit Court may have had the impression the Minister’s submissions proceeded from the same premise as those of the respondents. The Minister’s submissions before the Federal Circuit Court focused on the number of findings by the Tribunal which indicated it did not accept Ms Aulakh, and the evidence she presented, as credible. That approach did not need to distinguish between two possible interpretations of [48] of the reasons.

99 99 Therefore, whether to grant leave to the Minister or not falls to be determined on the basis that the Minister seeks to raise a new argument for the first time on appeal, concerning the correct interpretation of the Tribunal’s reasons, and therefore the alleged error in the approach of the Federal Circuit Court. In *Haritos* at [79], the Full Court referred with approval to the summary of the law given by another Full Court in *Summers* concerning the grant of leave to raise an argument on appeal for the first time. That was in the context of an appeal pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), but the point made in *Haritos* is that such an appeal should, substantively, be approached in the same way as a judicial review application. Accordingly, the principles concerning the grant of leave on an appeal are applicable to the present application by the Minister.

100 100 The authorities collected in *Summers* and approved in *Haritos* disclose that the operating principle is whether the Court is persuaded it is expedient and in the interests of the administration of justice to permit a new point to be raised on appeal for the first time. Where, for example, a party may be deprived of the possible benefit of calling additional, or different evidence, or of taking a different forensic approach at first instance because the

matter was not raised, that may suggest it is not in the interests of justice. Where the argument centres on a question of law (such as a construction argument), the balance may be different, although note needs to be taken of what is said in *Haritos* at [79] and [82] about matters not raised before a Tribunal. That is not the circumstance here.

101 101 In the present circumstance, there are no issues about different evidence, or a different forensic approach that might have been taken. The question raised by the new ground is a question of the characterisation of the Tribunal's finding in [48], and this Court is as well placed to engage in that characterisation as the Federal Circuit Court.

102 102 The respondents do, however, submit there is prejudice in granting leave. They rely on a passage from the decision of Perram J in *AAM15 v Minister for Immigration and Border Protection* [2015] FCA 804; 231 FCR 452 where his Honour said (at [14]):

...If this Court, in substance, determines a case at first instance by entertaining fresh grounds and a notice of contention this structure is thwarted because no appeal lies to the High Court other than by special leave which is rarely granted and then only on the grounds set out in s 35A of the *Judiciary Act 1903 (Cth)*. If the matter is effectively tried in this Court then the appellant is denied a layer of appellate scrutiny.

103 103 The respondents also rely on a similar approach by Buchanan J in *SZUGL v Minister for Immigration and Border Protection* [2015] FCA 868 at [18], and further submit that in *SZTIS v Minister for Immigration and Border Protection* [2017] FCA 545 at [37] the Minister is recorded as relying on Perram J's remarks to resist an application for leave to amend by an applicant.

104 104 The authorities to which the Full Court referred in *Haritos* make it clear there is no hard and fast rule about the grant of leave, and the Court's assessment of what is expedient and in the interests of the administration of justice will vary from case to case. Considerations of the kind set out in s 37M(1) and (2) of the *Federal Court of Australia Act 1976 (Cth)* have a role to play, although in this Court's appellate jurisdiction their emphasis may differ. Obviously, the Minister's application for leave to amend in this case has already caused the adjournment of the appeal, and the incurring of additional costs, together with additional delay for the respondents, in what on any assessment has been an extraordinarily long process – now of eight years – to resolve a single visa application. The course now to be taken by the Court means that, whether or not the application for leave is granted, there is no further delay involved.

105 105 By asking this Court, as the central aspect of the appeal, to interpret the Tribunal's reasons in a way that is different from the way the Federal Circuit Court interpreted them, the Minister is asking the Court to approach the judicial review of the Tribunal's decision from a new perspective. The nature of the error (if any) to be identified in the Federal Circuit Court's orders also changes. Although at one level of generality the error can still be described as wrongly concluding that the Tribunal's decision was the product of irrational or illogical reasoning, a description at that level of generality is not particularly informative about the character of the error said to have been made by the Federal Circuit Court.

106 106 The proposed amendment to ground 1 does not raise an error made by the Federal Circuit Court in the face of a contrary submission by the Minister, but rather an error made because of a positive submission on behalf of the respondents, not contradicted by the Minister.

107 107 In those circumstances, is it in the interests of justice to allow the Minister to run a different argument about the Tribunal's reasons for the first time on appeal? There is no doubt that the respondents are indeed denied a tier of appeal as of right from the outcome of any such argument. There is no doubt that, at least on this issue, this Court becomes the initial supervisory court in relation to the Tribunal's decision, contrary to the express intention of the Migration Act.

108 108 I accept there will be circumstances where these factors are not determinative. In my opinion, that will often be the case where the amendment is sought on behalf of a visa applicant, for reasons I have set out in other decisions: see for example: *ALZ15 v Minister for Immigration and Border Protection* [2017] FCA 279; *CPE15 v Minister for Immigration and Border Protection* [2017] FCA 591.

109 109 The Minister's position is not the same as that of a visa applicant. As the repository of the power in s 65, and as the active contradictor where there is a decision by a review authority or tribunal, the Minister's defence of any judicial review proceeding is conducted as an officer of the Commonwealth, not a person with a private interest in the outcome of any particular visa application. The Minister has an interest in Australian law being applied correctly to administrative decisions made under the Migration Act (although for reasons that are systemic rather than individual), which is at one level an interest shared with visa applicants. The Minister has an interest in the timely administration of the Migration Act, and proceedings involving it, but these are very much institutional interests.

110 As an institutional respondent, well resourced, whose representatives can be assumed to have a comprehensive knowledge of the applicable law, and to be well instructed on what arguments should be placed before the Court, and which should not, then in the absence of being able to show any particular prejudice should leave not be granted, in my opinion the question of leave where the Minister is the appellant will usually rest on the merits of the new ground to be advanced.

111 If the new ground has significant merit, that may be enough to warrant the grant of leave, despite the disproportionate interests at stake, and despite prejudice of the kind to which Perram J referred in *AAMI5*. That is because, ultimately, it is almost always going to be in the interests of the administration of justice for this Court to ensure that an administrative decision likely to be found to be affected by jurisdictional error is not carried into effect. That is a consequence of upholding the rule of law. One of the advantages of hearing a leave application together with the appeal itself is that the Court can have greater confidence whether a new argument falls into this category of significant merit or not.

112 In the present appeal, for the reasons I set out below, I do not consider the new ground to have enough merit for it to be in the interests of the administration of justice to grant the Minister leave to raise it for the first time on appeal. That is because in my opinion [48] of the Tribunal's reasons means what the Federal Circuit Court found it to mean.

The interpretation of the reasons of an administrative decision-maker

113 Determining the meaning of a passage in the reasons of an administrative decision-maker is the kind of exercise about which judicial minds might reasonably reach different judicial conclusions. There is no absolute and correct answer: it is a question of characterisation. In that sense it is analogous to the approach of drawing inferences from facts found.

114 In this context, the Minister referred to the Full Court's decision in *Minister for Immigration and Border Protection v SZVFW* [2017] FCAFC 33; 248 FCR 1, which has been subject to a grant of special leave to appeal by the High Court, and on which the High Court is currently reserved. That decision concerns a finding of legal unreasonableness by the Federal Circuit Court in relation to a decision of the (then) Refugee Review Tribunal. At [40]-[43], the Full Court emphasized the nature of this Court's appellate jurisdiction as one

established to “identify appealable error in an appeal by way of rehearing”. At [44], the Full Court said:

Secondly, we consider that the primary judge’s finding that the Tribunal’s decision under s 426A was unreasonable in the legal sense was fundamentally a decision which turned on her Honour’s evaluative judgment. That is because the primary judge was required to identify all the relevant particular circumstances of the matter, in the light of the relevant general principles of law, and to evaluate those circumstances with a view to determining whether or not the exercise of the Tribunal’s discretion was unreasonable in the legal sense. This evaluative exercise necessarily involved the primary judge determining what weight she should give to individual relevant circumstances.

115 At [45], and having adopted this starting point, the Full Court referred (by “broad analogy”) to the decision of Latham CJ in *Lovell v Lovell* [1950] HCA 52; 81 CLR 513 at 519, to the effect that there is a:

...need for caution by an appellate court which is asked to disturb the outcome of a discretionary judgment, where evaluative issues are also necessarily involved.

116 Then, at [48]-[57], the Full Court considered and rejected each of the Minister’s arguments as to why the finding of legal unreasonableness should be overturned.

117 The Full Court’s decision only becomes relevant in this appeal if this Court is persuaded it should adopt the same approach to the Federal Circuit Court’s finding about [48] as that adopted by the Full Court in *SZVFW* to the Federal Circuit Court’s finding of legal unreasonableness: that is, a cautious approach to disturbing the outcome, because the finding involves an evaluative judgment.

118 As I have noted above, the primary basis for my decision (and the refusal of leave) is that I consider the Federal Circuit Court’s interpretation of [48] to be correct. There is no “caution” necessary in this assessment. It results from a consideration of the whole of the Tribunal’s reasons, the material before it, and the parties’ submissions on the appeal. As I explain below, I consider the Tribunal made a finding Ms Aulakh did not work at New Style at all. Whether or not that is because the Tribunal went further than it needed to as a result of its adverse impression of Ms Aulakh is not to the point. On the other hand, the Tribunal may have concluded her entire work history was concocted, and she made an appearance on the day of the visit of the High Commission officers in order to continue the concoction. The Tribunal’s reasons say little about any detailed thinking behind its findings. In the context of the whole of its reasons, I consider there is only one way to read the Tribunal’s finding at

[48], and that is the way the Federal Circuit Court read it. On this primary approach, the Full Court decision in *SZVFW* is not relevant to my conclusion.

119 119 Further, if contrary to my opinion there is more than one way to interpret what the Tribunal finds at [48] of its reasons, I am not satisfied the interpretation adopted by the Federal Circuit Court is affected by an appellable error. It was open to the Federal Circuit Court to interpret the passage that way, in the context of the Tribunal's reasons as a whole. Again, that conclusion is not reached by an approach involving any particular "caution", as some of the authorities referred to by the Full Court in *SZVFW* might suggest. It is because the nature of the exercise in ascertaining what are the reasons of an administrative decision-maker is essentially a factual question: see *Rashid v Minister for Immigration & Citizenship* [2007] FCAFC 25 at [16]-[19]. Although a factual question, some characterisation is also involved, and different judicial minds might approach that characterisation differently. Rather than straightforward fact-finding based on evidence, it is thus akin to the drawing of inferences from facts, and the approach taken on appeal is whether an inference was reasonably open to the primary judge: see, for example *Honourable Brendan O'Connor v Adamas* [2013] FCAFC 14; 210 FCR 364 at [249] (Barker J, Lander and McKerracher JJ agreeing). *Adamas* was reversed on appeal to the High Court, but this aspect of the Full Court's decision was not in issue.

120 120 In my opinion, if there is no clear error by the Federal Circuit Court in its understanding and interpretation of the reasons of an administrative decision-maker, and more than one interpretation is available, then – just as with the drawing of inferences by a primary judge – an appellate court may ask whether the interpretation or characterisation by the Federal Circuit Court was one that was reasonably open to it.

121 121 Therefore, if contrary to my opinion, there is more than one answer available about the meaning of [48] of the Tribunal's reasons, I consider the interpretation adopted by the Federal Circuit Court was reasonably open, and is not affected by any appellable error for that reason.

122 122 The parties accepted, and it is the case, that PIC 4020 contains an evaluative element, in that s 97 of the Act (the provision in which the definition was located at the time of the visa application) defined "bogus document" in terms that turned on the reasonable suspicion of a decision-maker that a document is bogus. In the Full Court's decision in *Gill v Minister for*

Immigration and Border Protection [2017] FCAFC 51; 250 FCR 309, Griffiths and Moshinsky JJ held this involves an evaluative element: see [56]-[58], [90]-[92].

123 123 However, this is not how Ms Aulakh's grounds of review were expressed before the Federal Circuit Court. She did not, in terms, challenge the reasonableness of the suspicion formed by the Tribunal. She challenged as irrational the fact-finding which underpinned the suspicion. That is, she adopted the approach considered in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611. That may, in the end, amount to the same challenge, but for the purposes of this appeal the ground of review as put to the Federal Circuit Court provides the context for the Minister's appeal before this Court.

124 124 I now turn to explain why I have reached the conclusion I have about how [48] of the Tribunal's reasons should be read.

Paragraph 48 of the Tribunal's reasons

125 125 It is important to recall, as the respondents submitted, the function of the finding at [48] of the Tribunal's reasons in its overall review.

126 126 Ms Aulakh's visa application was for a skilled visa where her nominated occupation was "hairdresser". The question for the Tribunal on review of the delegate's decision, was whether to affirm or set aside the delegate's refusal to grant that visa because Ms Aulakh did not satisfy PIC 4020, in that she had given, or caused to be given, to the TRA information that was false or misleading in a material particular, resulting in the provision of a "bogus document" in relation to her visa application. That false or misleading information was said to be the 2006 work reference from Ms Bajaj at New Style. The full text of the work reference should be set out

To Whom So Ever It May Concern

It is certified that Miss Maninder Kaur D/o S. Gudarshan Singh is working with us as a hairdresser. She joined us after completing her diploma Beautician/Hair dresser from USHA Beauty Clinic in June 1998. She joined my Parlour i.e. New Style Beauty Parlour as a full time employee in 1st July, 1998 and working till date. She was performing very well.

127 127 The Tribunal's conclusion on the question in the review is not found in [48] of the reasons alone, but in [48] and [49], read together. The conclusion is that Ms Aulakh had given, or caused to be given to the TRA, a work reference (from Ms Bajaj) that was false, with the result (see [50]-[51]) that the skills assessment provided to the Minister was a bogus

document for the purpose of PIC 4020. It is that conclusion which must be found to be irrational or illogical (whether as a conclusion or through its reasoning) for there to be jurisdictional error affecting the Tribunal's task on review. The Tribunal's finding at [48] that it "is not satisfied that the first named applicant was employed as a hairdresser at New Style Beauty Parlour and Coaching Centre" is the reason why the Tribunal found the work reference to be false. Of course, there were a number of intermediate findings by the Tribunal leading to that important finding in [48], but it is the meaning of that finding that is critical.

128 128 Other parts of the Tribunal's reasons must be considered, so that the context for what it sets out in [48] can be properly understood.

129 129 At [11]-[12], the Tribunal notes the visa application nominated the occupation of hairdresser, and that the skills assessment from the TRA (which was a positive one) stated that for migration purposes "the first named applicant" had been designated as a hairdresser. At [13] the Tribunal records that the TRA informed the delegate that the work experience considered for the purpose of the skills assessment by the TRA was based on the work reference from New Style Beauty Parlour & Coaching Centre, India.

130 130 Also at [13], the Tribunal summarised the delegate's decision, in its own words, especially concerning the assessment conducted in 2007 at the premises of New Style by officers of the Australian High Commission. This is the way the Tribunal summarised the delegate's findings:

- • The referee (listed in the work reference letter) confirmed that she had not written the work reference and was not aware of the contents of the work reference.
- • The referee could not produce evidence to support the first named applicant's claim that she had been undertaking the full range of duties of a hairdresser.
- • The referee confirmed that the business primarily provided beauty treatments and that the first named applicant performed these duties rather than duties associated with hairdressing.
- • The referee confirmed that the first named applicant was not employed in a full time position.
- • The Departmental officers were satisfied that the first named applicant undertook the following duties:
 - • Cuts, styles and straightens hair.
 - • May provide services such as manicures, facials, eyelash and eyebrow tinting, Make up, wax treatments and ear piercing.

- • The Departmental officers were satisfied that the first named applicant did not undertake the following duties:
 - • Provide advice on hair care, beauty products and hairstyles.
 - • Provide treatments such as shampooing, colouring or scalp conditioning.
 - • Shaves and trims beards and moustaches.
 - • Arrange appointments and collects payments.
 - • Cleans work areas and instruments.
 - • Clean, colour, cut and style wigs and hairpieces.

131 131 At [18]-[19] the Tribunal refers to three customer references Ms Aulakh submitted to the Tribunal. Due to similarities between them in content, including in the misspelling of “whom” as “whoem”, the Tribunal doubted the authenticity of the references, and found that it should have been straightforward for Ms Aulakh to secure references from her customers, if she had in fact worked at New Style. It said so in the following terms (at [21]):

The Tribunal is of the view that if the first named applicant had worked as a hairdresser at New Style Beauty Parlour & Coaching Centre from 1 July 1998 to September 2007 she would have had many regular customers who could have provided her with references.

132 132 At [23], the Tribunal went on to find, on the basis of the conclusion these references were not authentic, that:

If the first named applicant prepared; or had someone prepare for her, fake references from customers, it raises serious concerns for the Tribunal as to whether she worked as a hairdresser at New Style Beauty Parlour & Coaching Centre from 1 July 1998 to September 2007.

133 133 The way both these sentences are phrased, including by the use of a specific period of time, tends to suggest the Tribunal doubted Ms Aulakh ever worked at New Style at all. Otherwise, the reference to the period of time is difficult to understand.

134 134 At [23], the Tribunal continues with a further finding that the way Ms Aulakh filled out her visa application exacerbated the Tribunal’s concerns. The Tribunal notes that, when the form required Ms Aulakh to give details of her employment over the previous four years prior to June 2010, Ms Aulakh gave details of her employment as a hairdresser at a place called Hairway Australia Pty Ltd for almost two years (from August 2008 to June 2010), but did not mention her period of work at New Style. The Tribunal concluded:

The failure to mention her employment at New Style Beauty Parlour and Coaching

Centre raises further doubts that she was employed there as a hairdresser.

135 135 This conclusion must be read with the fact, as the Tribunal was well aware and had already acknowledged in its reasons by this point, that Ms Aulakh had put forward her work at New Style as the period of employment that formed the basis for her TRA assessment in the visa occupation category of hairdresser. Read in that context, this part of the Tribunal's reasoning again seems to focus on whether the Tribunal should find Ms Aulakh's employment at New Style was fabricated.

136 136 I pause to note here that the Tribunal does not doubt that Ms Aulakh did, in fact, work at Hairway Australia Pty Ltd, and that the work she performed was as a hairdresser. Indeed it makes an express finding to this effect at [45] of its reasons. If what was occupying the Tribunal's mind was whether Ms Aulakh had the skills to work as a hairdresser, and had the experience of doing so, one would have thought Ms Aulakh's employment at Hairway Australia Pty Ltd would have been in sharper focus in the Tribunal's reasoning. In my opinion it was not in sharp focus because it was not Ms Aulakh's hairdressing skills or experience that was troubling the Tribunal, it was whether she had, in fact, worked at New Style at all, or whether this period of employment was concocted.

137 137 The Tribunal then turned to a number of considerations which led it to the conclusion there were several material inconsistencies in Ms Aulakh's narrative. These included (at [24]):

...the days and times the first named applicant worked at New Style Beauty Parlour & Coaching Centre, her lunch break, when she left that employment, the mixture of beauty work and hairdressing work undertaken by her, the opening hours of New Style Beauty Parlour & Coaching Centre and the staff who worked there.

138 138 Only one of these factors concerned the nature of the work undertaken: the rest could only be relevant to whether Ms Aulakh worked at New Style at all. The Tribunal explored what it saw as the inconsistencies in [26]-[32] in more detail, and then also described at [34] to [37] how it put those inconsistencies to Ms Aulakh. It is true, as I have noted, that one of the matters concerned the proportions of Ms Aulakh's work at New Style which could be described as "beauty" work and those which could be described as hairdressing work. However, overwhelmingly, the Tribunal's focus is on a wider range of inconsistencies which, if relevant at all, could only go to the question of whether Ms Aulakh ever worked at New Style.

139 139 Having discussed Ms Aulakh's responses to the invitation to comment, the Tribunal then made a further finding (at [41]), relying in part on the departmental investigations in 2007:

The Departmental investigators found that the work reference dated 24 June 2006 from New Style Beauty Parlour and Coaching Centre was not genuine. Information contained in the Report prepared by the Departmental investigators following their investigation raises concerns for the Tribunal in relation to the first named applicant's employment at New Style Beauty Parlour and Coaching Centre and the work reference dated 24 June 2006.

140 140 This again appears to be a more generalised finding about Ms Aulakh not being employed at New Style at all.

141 141 At [42], the Tribunal refers to what it saw as conflicting evidence about the presence or absence of appointment books at New Style, observing that:

The appointment books would have provided evidence of whether the first named applicant worked there, what work she did and how long she had worked there.

142 142 This observation by the Tribunal is also broader than an expression of doubt about the kind of work Ms Aulakh performed at New Style. At [43], on the matter of the appointment books, the Tribunal expressed its conclusions in a way that clearly articulated its doubt that Ms Aulakh was ever employed at New Style:

The first named applicant has been aware since 2007 that there is an issue in relation to her employment at New Style Beauty Parlour and Coaching Centre and the work reference dated 24 June 2006. If she worked at New Style Beauty Parlour and Coaching Centre from 1 July 1998 to September 2007 she would have known that there were appointment books and should have known that Ms Bajaj kept employee records. These records would have assisted her to support her visa application and to resolve the issue of her employment at New Style Beauty Parlour and Coaching Centre. She has not provided the Department or the Tribunal with a copy of the relevant appointment books and the records kept by Ms Bajaj in relation to her employment and the duties she performed at New Style Beauty Parlour and Coaching Centre despite being represented by migration agents during this period. Her failure to do so raises concerns for the Tribunal in relation to whether she was employed at New Style Beauty Parlour and Coaching Centre.

(emphasis added)

143 143 At [44]-[46], and after referring to photographs submitted by Ms Aulakh of the New Style salon and various clients in it (in substance rejecting the authenticity of the photos), the Tribunal then went through Ms Aulakh's evidence about her hairdressing qualifications and

experience in both India and Australia, and appeared to accept that evidence. In other words, the Tribunal did not appear to doubt that Ms Aulakh, at the time of the Tribunal hearing, had qualifications as a hairdresser and had worked as a hairdresser for some considerable period of time. However, these conclusions were independent of the Tribunal's finding about PIC 4020.

144 144 At [50], after the two key passages at [48] and [49] to which I have referred above, the Tribunal then made a finding that the information in the work reference from New Style was false or misleading in a material particular. That "material particular" was, in my opinion, that Ms Aulakh was employed at New Style in the period mentioned in the work reference. The Tribunal then found that Ms Aulakh had given, or caused to be given to the TRA (as a relevant assessing authority), information that was false or misleading in a material particular in relation to the application for a visa, and this meant she did not satisfy the criterion in PIC 4020.

145 145 Finally, if the Minister's proposed interpretation of [48] of the Tribunal's reasons is correct, it would be reasonable to expect there to be one or more other findings made by the Tribunal, such as what Ms Aulakh's duties at New Style actually were. The Tribunal's description of what was false or misleading about the work reference would also have been different, in my opinion: it would have related to falsity concerning the nature of the duties. The absence of any findings to this effect confirms the interpretation of the Tribunal's reasons which I consider to be the most obvious one.

146 146 To summarise, when the Tribunal's reasons are read as a whole, fairly and in context, it is apparent that the Tribunal was not satisfied Ms Aulakh was employed at all by Ms Bajaj at New Style in the period specified in the work reference: namely between 1 July 1998 to September 2007 (being the end date of her employment given in the second work reference). While part of its reasoning related to inconsistencies in the various accounts of her duties, most of the Tribunal's fact-finding focussed on matters which were relevant to whether Ms Aulakh was employed at all in that business. I consider this reading of the Tribunal's reasons is a straightforward one, and the Federal Circuit Court was correct to understand the Tribunal's reasons in this way.

147 147 Therefore, I consider there is insufficient merit in the Minister's proposed new ground of appeal (styled as paragraph 1(b)) for leave to be granted to the Minister to raise it, taking into account the other matters to which I have referred above.

148 148 It is now necessary to turn to the Minister's remaining grounds of appeal.

Ground 1(a)

149 149 It will be recalled the Federal Circuit Court held that the Tribunal's finding at [48] was not "supported by the evidence" (Federal Circuit Court reasons at [35]), and was therefore, legally unreasonable. At [38], the Federal Circuit Court found that the "phenomenon of the first applicant's employment at New Style was not the subject of challenge or confrontation by the Tribunal", but instead the Tribunal challenged Ms Aulakh on "peripheral" matters. The Federal Circuit Court concluded this paragraph with the finding that:

At no stage did the Tribunal confront the applicant with the concept that the applicant had not worked at New Style at all.

150 150 The Minister accepted the Tribunal did not "confront" Ms Aulakh directly with any such proposition. The Minister submitted that was because the Tribunal made no such finding. Contrary to the Minister's contention, I have found the Tribunal did make such a finding. As I have sought to explain above, it had a number of bases for this finding. I consider it must have been obvious to Ms Aulakh, and her representative, that the Tribunal had doubts she had ever been employed at New Style, especially given the central issue was whether she had submitted a fraudulent work reference.

151 151 The Federal Circuit Court may well have been correct to describe what occurred on the review as the Tribunal member being "suspicious from the start about the reference letters given in favour of the first applicant": see [40] of the Federal Circuit Court reasons. It should be recalled the delegate had expressed similar views. It is not dissimilar to the view taken by the officers of the Australian High Commission, although when the original report is considered (see [130] above) it is clear that those officers were not persuaded Ms Aulakh performed the hairdressing duties Ms Bajaj contended she did in the work reference, although they clearly also formed the view that Ms Aulakh worked at New Style, and indeed the report does not really question the fact of Ms Aulakh's employment. Senior counsel for the Minister accepted this was the correct view of the High Commission report in his reply submissions on the appeal.

152 152 In other words, the conclusion of the authors of that report that the work reference was "not genuine" appeared to have been based on a view about the *duties* Ms Aulakh was

performing, rather than her employment itself. By the time the matter came before the Tribunal, that distinction had become blurred. It is not up to this Court to speculate why that might be so: the Tribunal's reasons are, consistently with s 430(1) of the Migration Act, the record of its decision, its findings on any material questions of fact and of the evidence or other material on which it relied.

153 153 In reply, senior counsel for the Minister submitted that the first limb of ground 1 would remain available "irrespective of and independent from any operation" of the new ground in 1(b). In other words, the Minister submitted that there was a rational basis for the Tribunal's conclusions, even if read as the Federal Circuit Court read them. In his initial written submissions (prior to the application for leave to amend), the Minister contended, first, that the Federal Circuit Court had erred in its reasoning because the Federal Circuit Court did not address that part of the Tribunal's reasoning based on the inconsistent evidence between Ms Aulakh and Ms Bajaj as to the circumstances in which the reference letter was produced (see the Tribunal's reasons at [36]). He then contended, second, that the Federal Circuit Court had also not addressed the Tribunal's reasoning about the customer reference letters not being authentic, nor the Tribunal's finding that Ms Aulakh had not listed New Style as past employment in her visa application.

154 154 I consider the Minister's submissions on this aspect of ground 1(a) should be accepted. The Federal Circuit Court did focus too narrowly on certain aspects of the Tribunal's reasoning, rather than on all of it. I have already set out the key steps in the Tribunal's reasoning, and in my opinion there is nothing apparently illogical or irrational about the course the Tribunal took. The Tribunal conducted a review hearing in which it listened to Ms Aulakh and to Ms Bajaj. While the Tribunal made what might be described as a more extreme factual finding against Ms Aulakh (that she was not employed at New Style at all), on the evidence I am not prepared to describe that finding as one which, on the material before the Tribunal as a whole, was within the terms of irrationality as that concept is explained by Crennan and Bell JJ in *SZMDS* at [130]:

In the context of the Tribunal's decision here, "illogicality" or "irrationality" sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a

complaint that a decision is “clearly unjust” or “arbitrary” or “capricious” or “unreasonable” in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.

155 155 The Tribunal also emphasised the unsatisfactory nature (from its perspective) of the responses given by Ms Aulakh and her representative to the Tribunal’s invitation to comment. There is no doubt that, as Crennan and Bell JJ said at [131], “logical or rational or reasonable minds might differ in respect of the conclusions to be drawn” from the evidence on review before the Tribunal. The existence of such difference is insufficient to establish irrationality or illogicality, in either reasoning or outcome.

156 156 The Federal Circuit Court erred in finding jurisdictional error on the basis of irrationality without considering all of the Tribunal’s reasoning, as it appeared in its statement of reasons, and as I have set out above. The Federal Circuit Court also referred in the critical part of its reasoning to the High Court decision in *Li*, and appears to have considered irrationality and legal unreasonableness as somewhat interchangeable grounds of review. This appeal is not the occasion to consider that rather vexed question, a matter to which Crennan and Bell JJ adverted in *SZMDS* at [121]–[131].

157 157 It was not necessary before the Federal Circuit Court, and it was not necessary on this appeal, to go beyond the Tribunal’s reasons, as it set out the basis for its conclusion (as it was required to do) in sufficient detail. Resort on judicial review to the transcript of the Tribunal’s review hearing, and to the primary evidence or material before the Tribunal, for the purposes of supplementing, interpreting, or bolstering its reasons as set out in its decision, should be avoided. The review transcript may be necessary for some grounds of review, such as procedural fairness or (possibly) no evidence. It should not be used as an interpretative tool for the Tribunal’s reasons. I respectfully agree with Griffiths J in *Kelly v Australian Postal Corporation* [2015] FCA 1064; 67 AAR 359 at [51]–[53], and I have previously expressed my agreement in *Minister for Immigration and Border Protection v MZAIIV* [2016] FCA 251 at [33].

Ground 2: No basis to infer Ms Bajaj's evidence had not been considered by the Tribunal

Ground 2 of the Minister's appeal arises from several passages in the Federal Circuit Court reasons. Having noted at [38] that Ms Bajaj gave evidence Ms Aulakh had worked for her at New Style, the Federal Circuit Court emphasised this aspect of the evidence before the Tribunal with the following passage (at [39]):

When asked by the Tribunal whether the applicant worked for her, Ms Bajaj said —

Yes. Yes. Definitely, she worked for me and she was one of the brilliant staff for me.

Then, at [44], in its consideration of ground two the Federal Circuit Court found the Tribunal had "ignored" Ms Bajaj's evidence.

The Minister contended that there was no basis to infer that the evidence of Ms Bajaj had not been considered by the Tribunal. It will be apparent that I accept that submission. It is clear from the summary I have given above that the Tribunal was also sceptical about Ms Bajaj's evidence.

The Minister relied on *Nigam v Minister for Immigration and Border Protection* [2017] FCAFC 127 at [59], but that passage is really about the failure of a decision-maker to advert to evidence contended to be significant. Here, the Tribunal set out why it had difficulties with Ms Bajaj's evidence, as I have summarised above.

Ground 2 succeeds.

Ground 3: No breach of ss 348 and 357A of the Migration Act

I also accept the Minister's submissions on ground 3.

At [48] of its reasons, the Federal Circuit Court concluded the Tribunal had conducted the review in a "peculiar manner". The Federal Circuit Court found that the Tribunal did not make the "precise information obtained or supplied by the Australian High Commission officers" available to Ms Aulakh and her migration agent. The Federal Circuit Court found that, instead, the Tribunal had paraphrased the report. The Federal Circuit Court found this meant the Tribunal had conducted the review unfairly, and not in accordance with ss 348 and 357A of the Migration Act. There was no analysis by the Federal Circuit Court about how this was so: rather, a conclusion was expressed.

165 165 It is unnecessary to express any opinion on whether ss 348 and 357A could provide a basis for a finding of the kind made by the Federal Circuit Court. It suffices for the purposes of the Minister's appeal to recognise that the Federal Circuit Court's conclusion proceeded on a factually erroneous basis.

166 166 On the evidence before this Court on the appeal, Ms Aulakh's migration agent had the Australian High Commission report (albeit in redacted form), which he had obtained through an application under the *Freedom of Information Act 1982* (Cth). The Federal Circuit Court findings overlook that fact. They also overlook the fact that Ms Aulakh's migration agent made submissions to the Tribunal about the Australian High Commission report, as the Tribunal records at [47], where the Tribunal also records that:

The applicants' migration agent has provided the Tribunal with a copy of the Report prepared by the Departmental investigators about the HC report.

167 167 Ground 3 succeeds.

CONCLUSION

168 168 The appeal should be allowed, and consequential orders made. Ms Aulakh should pay the costs of the judicial review application in the Federal Circuit Court, on the usual fixed basis. As to the costs of the appeal to this Court, the parties should be heard on that question before orders are made.

I certify that the preceding one hundred and thirty-three (133) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer.

Associate:

Dated: 19 June 2018

SCHEDULE OF PARTIES

VID 376 of 2017

Respondents

Fourth Respondent: SATINDER SINGH

Fifth Respondent ADMINISTRATIVE APPEALS TRIBUNAL